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No. 06-952

In the Supreme Court of the United States

MUHAMMAD TARIQ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of an approved labor certification application, an alien can establish prima facie eligibility for adjustment of status under 8 U.S.C. 1255(i) for purposes of seeking reopening of his removal proceedings.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Ahmed v. *Gonzales*, 447 F.3d 433 (5th Cir. 2006) 3, 4, 5, 7, 9
Gutierrez-Lopez, In re, 21 I. & N. Dec. 479 (BIA 1996) ... 2
Khan v. *Attorney Gen. of the U.S.*, 448 F.3d 226 (3d Cir. 2006) 3, 7
INS v. *Abudu*, 485 U.S. 94 (1988) 2, 5, 6
INS v. *Doherty*, 502 U.S. 314 (1992) 8
Ordonez v. *INS*, 345 F.3d 777 (9th Cir. 2003) 2
S-V-, In re, 22 I. & N. Dec. 1306 (BIA 2000) 2
Sevoian v. *Ashcroft*, 290 F.3d 166 (3d Cir. 2002) 2, 8
Subhan v. *Ashcroft*, 383 F.3d 591 (7th Cir. 2004) 4, 8
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9
Zafar v. *United States Att'y Gen.* 461 F.3d 1357 (11th Cir. 2006) 7

Statutes and Regulations:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* ... 1
8 U.S.C. 1229a(c)(6) 1

Statutes and regulations—Continued: Page

8 U.S.C. 1255(i) ..... *passim*
8 U.S.C. 1255(i)(1)(B)(ii) 3
8 U.S.C. 1255(i)(2) 7
8 U.S.C. 1255(i)(2)(A) 7
8 U.S.C. 1255(i)(2)(A)-(B) 3
8 C.F.R.:
Section 204.5(a) 3, 7
Section 1003.2(a) 6, 8
Section 1003.2(c) 8
Section 1003.2(c)(1) 2, 4, 6
Section 1245.2(a)(2) 3
Section 1245.10(a)(1)(i)(B) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is reprinted in 202 Fed. Appx. 698. The decisions of the Board of Immigration Appeals (Pet. App. 4-5, 6-7) and the immigration judge (Pet. App. 8-17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2006. The petition for a writ of certiorari was filed on January 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien "may file one motion to reopen [his removal] proceedings." 8 U.S.C.

1229a(c)(6). Under the regulations governing motions to reopen, a motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." 8 C.F.R. 1003.2(c)(1). In addition, a "motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation." *Ibid.* The "decision to grant or deny a motion to reopen * * * is within the discretion of the Board [of Immigration Appeals]." 8 C.F.R. 1003.2(a).

An alien seeking to reopen his removal proceedings to enable him to apply for new relief must establish prima facie eligibility for that relief. See *INS* v. *Abudu*, 485 U.S. 94, 104 (1988) (a motion to reopen may be denied if "the movant has not established a prima facie case for the underlying substantive relief sought"); *In re Gutierrez-Lopez*, 21 I. & N. Dec. 479, 482 (BIA 1996) (an alien must establish prima facie eligibility for the relief sought before a motion to reopen will be granted). Establishing a prima facie case of eligibility "requires the applicant to produce objective evidence showing a 'reasonable likelihood' that he can establish" that he is entitled to relief. *Sevoian* v. *Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citation omitted); accord *Ordonez* v. *INS*, 345 F.3d 777, 785 (9th Cir. 2003); *In re S-V-*, 22 I. & N. Dec. 1306, 1308 (BIA 2000) (en banc) (a prima facie case of eligibility must "reveal[] a reasonable likelihood that the * * * requirements for relief have been satisfied").

b. Under 8 U.S.C. 1255(i), certain aliens who otherwise would be ineligible to adjust their status to that of an alien lawfully admitted for permanent residence, including aliens who entered the United States without

inspection, may seek to adjust their status upon payment of a fee. Section 1255(i) applies to an alien who entered the United States without inspection if, *inter alia*, the alien is the beneficiary of an application for a labor certification filed on his behalf on or before April 30, 2001. 8 U.S.C. 1255(i)(1)(B)(ii); 8 C.F.R. 1245.10(a)(1)(i)(B). An applicant for adjustment of status under Section 1255(i) must also meet other statutory eligibility requirements, including that the alien be eligible to receive an immigrant visa and be admissible to the United States for permanent residence, and that an immigrant visa be immediately available to the alien at the time that the application is filed. 8 U.S.C. 1255(i)(2)(A)-(B).

Applying for adjustment of status under Section 1255(i) based on an employer's application for labor certification involves a "long and discretionary process." *Ahmed* v. *Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006). The potential employer must first file an application for a labor certification and establish, *inter alia*, that there is no United States citizen available to fill the job. The filing of an application for a labor certification by an alien's prospective employer is "only the first preliminary step toward completing a § 1255(i)" adjustment-of-status application. *Id.* at 438. If the labor certification is approved, the prospective employer must then file the approved labor certificate along with an employment-based visa petition (Form I-140). See 8 C.F.R. 204.5(a). Finally, if the employment-based visa petition is approved, the alien's application for adjustment of status will be considered for adjudication. See 8 C.F.R. 1245.2(a)(2); *Khan* v. *Attorney Gen. of the U.S.*, 448 F.3d 226, 228 n.2 (3d Cir. 2006) (explaining the "three-step process" required for an alien to adjust status under

Section 1255(i) by means of an employment-based visa petition); *Ahmed*, 447 F.3d at 438 n.3 (same).

2. Petitioner is a native and citizen of Pakistan. Pet. App. 8. He entered the United States in 1998 as a nonimmigrant visitor and remained beyond his authorized stay. *Ibid.* In March 2003, the government initiated removal proceedings against petitioner. *Ibid.* On April 12, 2004, the immigration judge (IJ) found petitioner removable as charged. *Id.* at 8-9. The IJ also denied petitioner's application for withholding of removal, and ordered him removed from the United States. *Id.* at 16.

On July 14, 2005, the Board of Immigration Appeals (Board) affirmed the IJ's decision. Pet. App. 6-7. Petitioner then filed a petition for review with the court of appeals. See *id.* at 1-2.

3. While his petition for review was pending, petitioner filed a motion with the Board to reopen his removal proceedings. Pet. App. 4. He sought reopening to permit him to apply for adjustment of status based on a pending—but as yet unapproved—application for labor certification that had been filed on his behalf by a prospective employer. Petitioner relied on *Subhan* v. *Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004), which held that an IJ had abused his discretion by denying a continuance of removal proceedings where an application for labor certification had been filed on the alien's behalf.

On November 28, 2005, the Board denied petitioner's motion to reopen. Pet. App. 4-5. The Board noted that, pursuant to 8 C.F.R. 1003.2(c)(1), a motion to reopen for the purpose of seeking new relief (such as adjustment of status) "must be accompanied by the appropriate application and by all the supporting documentation." Pet. App. 4. The Board held that petitioner had failed to sat-

isfy that requirement because he had submitted no evidence showing that he was the beneficiary of an approved labor certification. *Ibid.* The Board explained that, "[i]n the absence of an approved labor certification, [petitioner] is unable to establish prima facie eligibility for [adjustment of status under Section 1255(i)] so as to warrant reopening." *Id.* at 4 (citing *Abudu*, 485 U.S. 94). The Board also held that *Subhan* was not binding precedent because petitioner's case did not arise in the Seventh Circuit. *Ibid.*

4. The court of appeals denied the petition for review in an unpublished, per curiam opinion. Pet. App. 1-3.[1] The court observed that a successful motion to reopen must establish a prima facie case of eligibility for the underlying relief sought. *Id.* at 2 (citing *Abudu*, 485 U.S. at 104). The court ruled that the Board did not abuse its discretion in finding that petitioner had failed to show his eligibility for adjustment of status under Section 1255(i). *Id.* at 3. The court explained that eligibility for adjustment of status under Section 1255(i) requires that (i) the alien be eligible to receive an immigrant visa and admissible to the United States for permanent residence; and (ii) an immigrant visa be immediately available to the alien at the time the application is filed. *Id.* at 2. Here, the court reasoned, the filing of a labor certification does not itself "vest an alien with any right to relief from removal but is merely one step in the 'long and discretionary process' of obtaining an adjustment of status under § 1255(i)." *Ibid.* (quoting *Ahmed*, 447 F.3d at 438-439).

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[1] On appeal, petitioner abandoned his first petition for review and sought review only of the Board's denial of his motion to reopen. See Pet. App. 1-2.

ARGUMENT

Petitioner argues (Pet. 13-16) that the Board was required to reopen his removal proceedings in light of the pending labor certification application that had been filed on his behalf. That contention lacks merit and does not warrant review.

1. The court of appeals correctly held that the Board did not abuse its discretion by determining that petitioner failed to meet his burden of establishing prima facie eligibility for adjustment of status under Section 1255(i). Pet. App. 3. Pursuant to 8 C.F.R. 1003.2(c)(1), "[a] motion to reopen proceedings [before the Board] for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation." Furthermore, to warrant reopening for that purpose, an alien must establish prima facie eligibility for that relief. See *INS* v. *Abudu*, 485 U.S. 94, 104 (1988) (holding that a motion to reopen may be denied if "the movant has not established a prima facie case for the underlying substantive relief sought"). Even then, the decision whether to grant or deny a motion to reopen is "within the discretion of the Board," and "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a).

It is undisputed that petitioner did not submit any evidence in connection with his motion to reopen showing that he was the beneficiary of an approved labor certification. Citing *Abudu*, the Board correctly ruled that, "[i]n the absence of an approved labor certification, [petitioner] is unable to establish prima facie eligibility for [adjustment of status under 8 U.S.C. 1255(i)] so as to warrant reopening." Pet. App. 4-5.

Petitioner contends (Pet. 14-15) that he established prima facie eligibility for adjustment of status by providing proof of a pending labor certification application. That argument lacks merit. The court of appeals recognized that, under the terms of Section 1255(i)(2), the Attorney General "may adjust" the status of an alien applying under Section 1255(i) only if "(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed." Pet. App. 2. At the time that he filed his motion to reopen with the Board, petitioner had no approved labor certification, his prospective employer had not filed an employment-based visa petition on his behalf, and he had no approved visa petition. See *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1363-1364 (11th Cir. 2006) ("The mere filing of a labor certificate application * * * does not make an alien *eligible* for adjustment of status under § 1255(i)."); *Ahmed* v. *Gonzales*, 447 F.3d 433, 438 (5th Cir. 2006) ("[N]othing in § 1255(i) vested any right to relief from removal when [the alien] filed his labor certification."). Indeed, without an approved labor certification, his potential employer could not file a visa petition on his behalf. 8 C.F.R. 204.5(a) (requiring that the Form I-140 be accompanied by an approved labor certification). Petitioner thus could not satisfy Section 1255(i)(2)(A)'s requirement that he be "eligible to receive an immigrant visa."

In short, without an approved visa petition in hand, petitioner could not demonstrate statutory eligibility for adjustment of status under Section 1255(i). See *Ahmed*, 447 F.3d at 438 n.3; *Khan v. Attorney Gen. of the U.S.*, 448 F.3d 226, 235 (3d Cir. 2006) (noting that an approved

immigrant visa "is a prerequisite to an adjustment of status under § 1255(i)"). Therefore, petitioner could not make out a case of prima facie eligibility, which "requires the applicant to produce objective evidence showing 'a reasonable likelihood' that he can establish" that he is entitled to relief. *Sevoian* v. *Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citation omitted).

2. Contrary to petitioner's argument (Pet. 16-19), the court of appeals' unpublished decision does not conflict with the decision of any other court of appeals. No court, in the context of a motion to reopen before the Board, has held that an alien can establish prima facie eligibility for adjustment of status under Section 1255(i) by showing the mere *pendency* of a labor certification application.

Petitioner argues (Pet. 12-13, 16-17) that the decision below conflicts with *Subhan* v. *Ashcroft*, 383 F.3d 591 (7th Cir. 2004). *Subhan*, however, arose in the distinct context of a request for a continuance of a pending hearing before an IJ, not a motion to the Board to reopen a removal order that has become final. See *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) (noting that the Attorney General has broad discretion to grant or deny motions to reopen, and that they are "disfavored" because "every delay works to the advantage of the deportable alien who wishes to remain in the United States."). Motions before the Board to reopen a final removal order are governed by distinct requirements not applicable to motions for a continuance before an IJ, see generally 8 C.F.R. 1003.2(a) & (c), including the requirement to establish prima facie eligibility for any form of newly requested relief. Petitioner did not satisfy that threshold requirement. *Subhan* necessarily did not address that requirement because it dealt with the separate issue of

an IJ's authority to grant or deny a request for a continuance in an ongoing proceeding.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2007

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[2] Insofar as petitioner suggests (Pet. 17-18) that the court of appeals' decision conflicts with prior decisions of that court, there is no occasion for this Court to review that suggested intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). In any event, petitioner errs in asserting an intra-circuit conflict. In both of the Fifth Circuit decisions he cites, as in this case, the court *sustained* the denial of the requested relief—either a request for a continuance or a motion to reopen. See Pet. 17-18.

Petitioner also errs in suggesting (Pet. 15-16) that the denial of his motion to reopen infringed his due process rights. The grant of a motion to reopen, and the grant of adjustment of status, are discretionary, such that their denial works no due process violation. See *Ahmed*, 447 F.3d at 440.